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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, OCTOBER 22, 2001

COMMONWEALTH OF VIRGINIA ex rel.

STATE CORPORATION COMMISSION

CASE NO. PUC010100

Ex Parte: In the matter of
establishing rules governing
an Alternative Dispute Resolution
Process for telecommunications
carriers

ORDER ADOPTING RULES

With the advent of competition in the telecommunications marketplace in Virginia, it is likely that disputes will arise between carriers that require expedited resolution to prevent an adverse impact on a carrier's ability to serve its customers. The State Corporation Commission ("Commission") recognizes the need for such an expedited procedure and herein promulgates rules governing an Alternative Dispute Resolution Process ("ADRP") to help support effective competition in Virginia.

On May 15, 2001, the Commission entered an Order inviting comments and requests for hearing on proposed rules ("Proposed Rules") for an ADRP. The Proposed Rules were developed with input from the Dispute Resolution Subcommittee¹ ("Subcommittee")

¹ The Dispute Resolution Subcommittee was established as a Subcommittee of the Collaborative Committee and consisted of representatives from numerous telephone companies, including both incumbent and competitive local exchange carriers and members of our Staff.

established as part of our collaborative effort in Case No. PUC000026.

By June 13, 2001, the Commission had received comments on the Proposed Rules only from Verizon Virginia Inc. and Verizon South Inc. (collectively "Verizon"), and Cox Virginia Telecom, Inc. ("Cox").

Verizon notes that the Proposed Rules represent a fair balance of the interests of all carriers and recommends the Commission adopt them. In addition, Verizon raises one point of clarification regarding the application of the rules of evidence to ADRP proceedings.

Cox observes that although it was satisfied with the content of the rules at the time the last draft was circulated to the Subcommittee, a revision is necessary to one rule due to recent events that occurred since then. It also suggests clarifying language in another rule.

On September 5, 2001, Verizon filed a motion for leave to file reply comments and its reply comments to Cox's June 13, 2001, filing. In its motion, Verizon states that it has been in discussions with Cox, trying to resolve the issues raised by the changes sought by Cox. Verizon suggests minor wording revisions to the specific rules enumerated by Cox.

NOW THE COMMISSION, having considered the Proposed Rules and the comments thereto, finds that we should adopt the rules

appended to this Order as Attachment A, effective October 23, 2001.

The rules we adopt herein contain only several minor modifications to those originally proposed by the Subcommittee and published in the Virginia Register of Regulations on June 4, 2001. These modifications were made after our consideration of the changes proposed by Verizon and Cox.

First, Verizon requests that the Commission clarify that the rules of evidence that apply to other on-the-record Commission proceedings will also apply to ADRP proceedings. We believe it was the Subcommittee's intent in drafting these rules to make them subject to 5 VAC 5-20-190. This rule requires that the common law and statutory rules of evidence, as observed and administered by the courts of record of the Commonwealth, apply to all proceedings in which the Commission is called upon to decide or render judgment in its capacity as a court of record. The rule also states that in other proceedings, evidentiary rules shall not be unreasonably used to prevent the receipt of evidence having substantial probative effect. We, therefore, affirm that the rules of evidence that apply to all formal Commission proceedings likewise apply to ADRP proceedings conducted pursuant to 20 VAC 5-405-10 et seq.

Next, we address Cox's suggestion that the last sentence of 20 VAC 5-405-10 B be revised to include directory listings and

directory assistance in the definition of "scheduled service." Cox states that although it initially had accepted the language contained in the Proposed Rules regarding this section, upon further consideration and in light of recent events involving a telephone directory, it believes the Commission should consider adding language to specifically include directory assistance issues as within the scope of ADRP. In Verizon's reply to Cox's comments, it states that it believes that the existing language of the rule is broad enough to address Cox's concerns but suggests a minor modification to Cox's proposal if the Commission believes a change is needed. Verizon recommends replacing "directory assistance" with "directory assistance databases." We agree with Verizon and have modified 20 VAC 5-405-10 B accordingly.

Cox also suggests clarifying language for the last sentence of 20 VAC 5-405-20, which discusses the obligation of a party filing a petition under the ADRP to have first attempted to resolve the issue via negotiations. Cox proposes alternative language to clarify that such negotiations would not necessarily consume 30 individual days of negotiations but would represent good faith attempts at negotiation over a 30-day period. Verizon recommends further clarification to this section to read as follows: "The written notice shall include a request for negotiations with the Respondent with respect to the dispute in

question, and both parties shall engage in good faith negotiations over the ensuing 30-day period; however, if the parties' interconnection agreement provides for a longer period during which negotiations with respect to the dispute in question must take place, the parties must engage in negotiations for the period specified in such interconnection agreement provision." We agree that, together, the changes suggested by Cox and Verizon clarify the intent of the rule, and we therefore adopt these changes.

Accordingly, IT IS ORDERED THAT:

(1) We hereby adopt the Rules for an Alternative Dispute Resolution Process for telecommunications carriers, appended hereto as Attachment A.

(2) A copy of this Order and the rules adopted herein shall be forwarded promptly for publication in the Virginia Register of Regulations.

(3) This case is dismissed, and the papers herein shall be placed in the file for ended causes.

CHAPTER 405.

RULES FOR ALTERNATIVE DISPUTE RESOLUTION PROCESS.

20 VAC 5-405-10. Scope of Alternative Dispute Resolution Process.

A. The Alternative Dispute Resolution Process ("ADRP") is limited to disputes between telecommunications carriers that arise from action or inaction by a telecommunications carrier that allegedly: (i) compromises the ability of a carrier to provide uninterrupted service, (ii) unreasonably delays the provisioning of scheduled service, (iii) violates a provision of an enforceable interconnection agreement, including nonexemption specific collocation disputes, or (iv) constitutes unfair competition.

B. For purposes of the ADRP, the term "scheduled service" includes scheduled installation, connection, provisioning, maintenance and repair, and disconnection, intervals for telecommunications services, unbundled network elements and other services, facilities and arrangements[;] provided by one carrier to another carrier that are necessary for the provision of telecommunications service to an end user. Such services, facilities, and arrangements include, but are not limited to, local number portability with and without loops, coordinated loop cut-overs, updates to databases, such as 911 databases[and,] line information data bases [and directory assistance databases, directory listings,] and lines that one carrier provides to another carrier.

C. A carrier unreasonably delays the provisioning of a scheduled service when the carrier misses the commitment time (if any) and date for the provisioning of the scheduled service, without good cause, as determined by the hearing examiner.

D. ADRP is not designed to be a substitute for any dispute resolution procedures that may be specified in the carriers' interconnection agreements; nor is the process designed to

handle disputes that involve generic policy issues, consumer complaints against carriers, requests for damages such as under any performance assurance plan, or any issues that the hearing examiner finds cannot be reasonably tried or the record developed on an expedited basis.

20 VAC 5-405-20. Notice and good faith negotiations.

The petitioning carrier (petitioner) shall give the answering carrier (respondent) and the Office of Hearing Examiners at least 30 days' written notice of its intent to file an Alternative Dispute Resolution Petition. Each ADRP notice shall be so identified in bold typeface at the top of the first page, as follows: "Notice of Intention to File an Alternative Dispute Resolution Petition with the Virginia State Corporation Commission." [In addition to the The]written notice[, and before a petition is filed under the ADRP, the petitioner shall engage in good faith shall include a request for] negotiations with the respondent with respect to the dispute in question [for the longer of either: (i) 30 calendar days or (ii) the period agreed to in their interconnection agreement, and both parties shall engage in good faith negotiations over the ensuing 30-day period; however, if the parties' interconnection agreement provides for a longer period during which negotiations with respect to the dispute in question must take place, the parties shall engage in negotiations for the period specified in such interconnection agreement provision].

20 VAC 5-405-30. Collocation disputes not involving a request for exemption from physical collocation.

Collocation disputes are within the scope of the ADRP, provided that disputes concerning exemption from a requirement to provide physical collocation shall not be handled in the ADRP but shall be handled in accordance with 20 VAC 5-400-[220-200] and other commission rules specifically intended to apply to such disputes.

20 VAC 5-405-40. Petition for resolution of disputed issues.

A. A carrier directly involved in a dispute subject to ADRP that cannot be resolved through good faith negotiations may file an Alternative Dispute Resolution Petition with the commission.

B. Each petition shall include specifics of the action or inaction alleged to have violated one or more of the four standards identified in 20 VAC 5-405-10. The petition shall also include copies of all documents within the petitioner's possession that are likely to bear significantly on the issues raised in the petition. As part of the Alternative Dispute Resolution Petition, the petitioner shall state that it has complied with the negotiation requirement of 20 VAC 5-405-20.

C. Finally, in order to ensure proper handling by commission staff and to provide notice to the respondent of the expedited schedule for processing these disputes, each Alternative Dispute Resolution Petition should be clearly so identified by bold typeface above the identifying caption on the first page as follows:

"Alternative Dispute Resolution Petition: Answer Due Within 10 Calendar Days."

20 VAC 5-405-50. Serving copies and docketing.

An original and four copies of the Alternative Dispute Resolution Petition shall be filed with the Clerk of the Commission. Each Alternative Dispute Resolution Petition will be assigned a separate docket number. Copies shall also be served on the respondent, the Office of General Counsel, the Office of Hearing Examiners, the Division of Communications, and the Office of the Attorney General on the same date. A pleading will be considered filed on the day the pleading is received by the Clerk of the Commission. A pleading will be considered served on the respondent on the day the pleading is received by the respondent.

20 VAC 5-405-60. Assignment of a hearing examiner; prehearing conference.

Within four calendar days of the filing and service of an Alternative Dispute Resolution Petition, a hearing examiner shall be assigned to the matter by the Chief Hearing Examiner. The hearing examiner shall schedule a prehearing conference at the earliest possible date to determine whether the petition qualifies for ADRP and, if so, to determine the schedule for the proceeding and other matters relevant to management and resolution of the dispute. At any time prior to the conclusion of the prehearing conference, the presiding hearing examiner may reject any petition for alternative dispute resolution that does not fall within the scope of this chapter or contains issues that cannot be reasonably tried or developed on an expedited basis. After the prehearing conference, the matter shall remain within the ADRP unless, upon motion by either the petitioner or respondent, the hearing examiner decides otherwise.

20 VAC 5-405-70. Answer.

Within 10 calendar days of service of the Alternative Dispute Resolution Petition and supporting documentation on the respondent, the respondent shall file an answer with the clerk. The answer shall include copies of all documents in the respondent's possession that are likely to bear significantly on the issues raised in the petition. Copies shall also be served on the petitioner, the Office of Hearing Examiners, the Office of General Counsel, the Division of Communications, and the Office of the Attorney General on the same date.

20 VAC 5-405-80. Office of General Counsel.

The carriers will be the primary participating parties in the Alternative Dispute Resolution Process. The Office of General Counsel may participate in the proceeding but may not conduct formal discovery and is precluded from opposing the voluntary withdrawal of an Alternative Dispute Resolution Petition due to consummation of a settlement between the carriers.

20 VAC 5-405-90. Evidentiary hearing.

The presiding hearing examiner will conduct an evidentiary hearing including sworn witnesses, reasonable cross-examination, and a transcription of the record. The carriers will also have the opportunity to file briefs prior to the hearing examiner's adjudication. The hearing examiner shall issue an initial decision resolving the dispute within 35 calendar days of the filing of the Alternative Dispute Resolution Petition, unless the hearing examiner extends the time frame for good cause shown, recognizing that an expeditious result is in the public interest.

20 VAC 5-405-100. Discovery.

The carriers are encouraged to exchange information informally. The carriers will also be permitted to seek leave to conduct such limited formal discovery as deemed reasonable and necessary by the presiding hearing examiner to resolve the contested issues. Whether and the extent to which leave to conduct limited formal discovery should be granted is a matter within the discretion of the presiding hearing examiner.

20 VAC 5-405-110. Exceptions.

Participating carriers may file exceptions to the initial decision of the hearing examiner within seven calendar days of issuance. Reply exceptions shall be filed within five calendar days after exceptions are served. If no exceptions are filed and if the commissioners do not elect to review the initial decision within 15 calendar days of issuance, the commission will issue an order adopting the hearing examiner's initial decision. If exceptions are filed or if commission review is elected, the matter will be addressed by commission final order.

20 VAC 5-405-120. Mediation.

A. Either party may, at any time prior to five calendar days before the hearing, request that the Division of Communications conduct supervised settlement discussions. The request shall act as a stay of the proceedings of up to five business days pending mediation. However, the carriers may, by mutual agreement, further extend this period for an additional 30 days. No further extensions shall be permitted. The mediator shall have discretion to shorten the time

period for mediation if it appears that settlement is unlikely. If no settlement is reached, the stay will be terminated and the case referred back to the assigned hearing examiner. The stay shall not count against the hearing examiner's time to issue an initial decision. If a settlement is reached, the assigned mediator will immediately issue a mediation report with the attached proposed settlement agreement to the assigned hearing examiner for review and disposition by initial decision.

B. Staff assigned as mediators shall be bound by the commission's Rules of Practice and Procedure (5 VAC 5-20-10 et seq.) regarding their participation in a subsequently docketed case involving the same dispute.

20 VAC 5-405-130. Other remedies.

The ADRP is not intended to replace or preclude any other procedures or remedies otherwise available to any of the carriers under law, and a carrier's participation in this alternative dispute resolution process shall not be considered a waiver of any available substantive or procedural rights.